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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief in Opposition to Motion of Southern California Edison, et al., to Intervene

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I.

PRELIMINARY STATEMENT

On November 9, 1970, six California employers filed a Motion to Intervene in the present case. Appellees oppose this Motion for several reasons.

First, we submit that applicants' interest in the subject of this action is not a substantial one. As individual employers, applicants are members of a large class of Cali-

fornia employers. If the District Court decision appealed from is affirmed, and payment to an eligible claimant is required during the pendency of his past employer's appeal, that individual employer will suffer no direct financial loss. Any possible loss that might occur would be a collective one, spread over all California employers.

Secondly, we contend that applicants have overstated and exaggerated their interest in this case. Appellees will elaborate on this contention in a subsequent part of this brief.

Appellees further submit that any legitimate interest of the applicants has been and will be adequately represented by the Attorney General of the State of California and the Chief Counsel of Appellant Department of Human Resources Development. Moreover, as amici curiae, applicants will be able to further represent their interest in this litigation.

Finally, appellees submit that the Motion to Intervene is not timely. Applicants had ample time to intervene as formal parties when this case was before the court below. By choosing to wait until this case was before this Court, applicants should be prevented from intervening as formal parties.

II.

APPLICANTS' MOTION TO INTERVENE OF RIGHT SHOULD BE DENIED

A. Applicants' Interest in This Lawsuit Is Indirect and Insufficient to Warrant Their Intervention.

The 1966 amendment to Rule 24(a) states that an applicant for intervention must claim an interest relating to the property or transaction which is the subject of the action. This rule has been interpreted to require that such claim of

interest be legally sufficient from an objective standpoint, *Kheel v. American S. S. Owners Mut. Prot. and Indem. Assoc.* (S.D.N.Y. 1968), 45 F. R. D. 281; *Norwalk Core v. Norwalk Bd. of Ed.*, (D. Conn. 1968), 298 F.Supp. 208, as well as direct, substantial, and legally protectible. *Hobson v. Hansen*, (D.D.C. 1968) 44 F. R. D. 18.

Applicants, as individual employers, do not have the direct and substantial interest that is legally required for intervention. They contend that, if appellees prevail in this case, they will be subject to a "substantial increase in unemployment taxes." See Applicants' Motion, 9. Applicants allege that this increase would result from excessive disbursements from the general unemployment fund—such disbursements resulting from unrecovered overpayments (in the form of benefits) received by claimants whose initial determination of eligibility has been overruled by a referee. Applicants contend that these overpayments would necessitate an increase in their tax rate in order to compensate for the alleged losses suffered by the fund.

The proposition that an increase in the employers' tax would be required if appellees prevail is, at most, speculative. (See Part II B, 5 *infra*). However, even if we assume, *arguendo*, that the necessity for an increase in the employers' fund would arise, this would be borne by and spread over all California employers. The effect of such an increase on the individual employer would be relatively small. (See Part II B 6, 7 *infra*.) Thus, the interest of applicants is no greater than that of employees' groups and other organizations that may be affected by the Court's decision in this case. Applicants' financial stake may motivate their interest. This interest, however, is remote and not substantial enough to warrant intervention.

Applicants have relied heavily on the case of *Cascade Natural Gas Co. v. El Paso Natural Gas Co.* (1967), 386

U.S. 129, to show that private parties have a legally protectible private interest in issues of public interest. *Cascade* was an antitrust action in which the United States brought suit to compel El Paso Natural Gas Co. to divest itself of its subsidiary—Pacific Northwest Pipeline Co. The original decision of the lower court was appealed to the Supreme Court which, in turn, remanded the case to the District Court and ordered divestiture. At this point Cascade Natural Gas Co. and the State of California sought intervention. The facts and principles in *Cascade* are clearly distinguishable from the present case. First, the Motion for Intervention in *Cascade* was to the District Court, not to the Supreme Court, as here. Second, the movants for intervention in *Cascade* were customers of the company which the defendant was alleged to be controlling in violation of the Clayton Act, and the State of California whose citizens allegedly were suffering due to the control of a natural gas supply by the defendant. These movants were the very parties who were intended to benefit from the government's action in compelling divestiture. In allowing intervention, the Court stated that the protection of California's interests in a competitive system was "at the heart of the matter." 386 U.S. at 135.[1]

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1. It should be noted that, notwithstanding the fact that the applicants' interest in *Cascade* was more direct in nature, subsequent cases have tended to limit *Cascade* to its peculiar fact situation. *See e.g. United States v. Aluminum Co. of America* (E.D. Mo. 1967), 41 F. R. D. 342 *aff'd per curiam sub nom. Lupton Mfg. Co. v. United States* (1967) 388 U.S. 457; *United States v. Blue Chip Stamp Co.*, (C.D. Cal. 1967), 272 F.Supp. 432, *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States* (1968), 389 U. S. 580, *reh. den.*, 390 U. S. 975. *See also Moore v. Tangipahoa Parish School Board.* (E.D. La. 1969), 298 F.Supp. 288; *Hobson v. Hansen*, (D.D.C. 1968), 44 F. R. D. 18; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV., 721, 730 (1968); Kaplan, *1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 406 (1967).

In this case, however, applicants' interest is not sufficient to be considered at the "heart of the matter." As stated before, as individual employers, the only loss that applicants might suffer would be a collective one, borne by all California employers. This, coupled with the fact that applicants' alleged loss is very speculative, distinguishes *Cascade* from the present case.

B. The Employers' Claimed Financial Loss as a Result of the Decision Appealed from Is Grossly Overstated and Speculative.

Applicants contend that if the case at bar is affirmed, there will be an increase in the employers' taxes which would, in turn, lead to an increase in the amount of taxes paid by each employer. This rise in the tax rate is predicated on a projected loss to the unemployment insurance fund due to payments of benefits which are subsequently determined to be incorrect. This argument completely ignores the fact that the State has several methods of recouping any overpayments in addition to voluntary repayment by agreement, such as offsets against future unemployment or disability benefits and restitution to avoid criminal prosecution. California Unemployment Insurance Code Sections 1379 and 2113. Thus, applicants' contention that there will be a significant loss to the fund must be considered in light of these statutory devices.

At present, the reserves of the unemployment insurance fund are sufficiently ample so that employers are taxed at minimum rates. We are not told how much of a loss in unrecouped overpayments would be suffered before any effect on general employer taxes would result. Thus, the claimed financial stake is speculative and we don't know whether employers will ever feel the effect of this decision, or at what point it may be felt.

Applicants suggest that the implementation of the relief sought by appellees could result in the imposition of the highest possible rates in each of the three tax schemes used to support the unemployment fund. See Applicants' Motion to Intervene, 8-10. If we assume, *arguendo,* that each of the three separate taxes supporting the fund was raised to its highest level, the combined additional revenue to the fund in a year like 1968 would be 154 *million* dollars. See Affidavit of J. E. McNeil, dated November 19, 1969, paragraph 2(c), attached hereto as Exhibit A. However, appellants' statisticians estimate that the maximum amount of overpayment that would have resulted in the year 1968, if the challenged statute had not been in effect, would have been $800,000. See Affidavit of George Roche, dated November 18, 1969, paragraph I(3), attached hereto as Exhibit B. Of that amount, an average of 64 percent would have been recovered. See Affidavit of Nicolo Pino, dated July 20, 1970, paragraph E, attached to Appellant's Jurisdictional Statement as Appendix C. Thus, the net hypothetical loss to the fund would have been $288,000 for the year, (36 percent of $800,000). While substantial, it serves to show that the claims of applicants are exaggerated, because the amount of actual, unrecouped overpayment would have been .0019 (nineteen-ten thousandths) of the amount that applicants suggest would have been needed in increased taxes to pay for the overpayments, $\frac{(\$288{,}000\ )}{(\$154\ \text{Million})}$. Since the amounts by which the individual applicants claim their taxes would have been increased, were also based on the highest possible rates, they must be reduced by the same factor. Thus, in the case of applicant Southern California Edison, the applicant claiming the largest potential increase in taxes, the increase would be reduced from a claimed $434,341.00 to $825.25 a year. ($434,341.00 x .0019) See Affi-

davit of C. H. Faulkner, dated August 7, 1970, paragraph 5(b), attached to Applicants' Motion as Exhibit B. The alleged increase in the case of the applicant claiming the smallest increase would be $ .93 instead of the claimed $490.00 per year, ($490.00 x .0019). See Affidavit of Ralph W. Jones, dated August 11, 1970, paragraph 5(b), attached to Applicants' Motion as Exhibit F. This appears to indicate that while there may be some increase in taxes, its significance is highly exaggerated and the only party with a very substantial interest is the State which must administer the entire unemployment insurance program.

C. Any Interest Assertable by the Applicants in These Proceedings Is Adequately Represented by Appellant.

Intervention of Right should not be granted if it is shown that the applicants' interest is adequately represented by the existing parties. Fed. Rules Civ. Proc. Rule 24(a)(2), 28 USCA; See generally, 3B *Moore's Federal Practice Para.* 24.09-[4]; 2 *Barron & Holtzoff, Federal Practice and Procedure* Section 597 (Supp. 1969). The question of what constitutes adequacy of representation was analyzed in *Peterson v. United States* (D. Minn. 1966), 41 F. R. D. 131, which involved a Motion to Intervene by two remaindermen of a trust in an action to recover federal estate taxes. The Motion was denied, notwithstanding the fact that the interests of the plaintiffs and the movants might have been different in some respects. The court stated: "The controlling rule is that representation is adequate if there is no collusion between the representative and an opposing party, if the representative does not have or represent an interest adverse to the applicant, and if the representative does not fail in the fulfillment of his duty." *Peterson v. United States* (D. Minn. 1966), 41 F. R. D. 131, 133; accord, *Hatton v. County Bd. of Ed. of Maury County, Tenn.* (6th Cir. 1970), 422 F.2d 457.

In *Hatton* the court denied a petition to intervene on behalf of white parents and students who wished to oppose a desegregation plan adopted by the Board pursuant to the order of the District Court. It was found that there was an interest sufficient for intervention but that petitioners' interest did not lack adequate representation because defendants had raised every reasonable defense and the petitioners had made no allegation of fraud, collusion, bad faith or negligence on the part of the Board. The case at bar is directly on point with *Peterson* and *Hatton*. In the present case, there is clearly no collusion between the present parties; nor does the State have an interest adverse to applicants; nor can it be said that the Attorney General of the State of California lacks the competence and the resources to adequately represent the interest of applicants.[2]

The cases on which applicants have relied to show inadequacy of representation are not applicable to this case. Only one of these cases, *Smuck v. Hobson* (D.C. Cir. 1969), 408 F.2d 175, involved a private party attempting intervention to advocate a private interest in a policy defended by a public body. *Smuck* embraced the identical issue raised in *Hatton, supra:* whether parents of white children should be allowed to intervene in a desegregation suit brought against a school board. However, the reason that intervention was allowed in *Smuck* was that the defendant school board in *Smuck* declined to appeal the lower court decision that was adverse to the petitioner's interests. Thus, the

2. There is no suggestion, as in the *Cascade* case, that the State and the private parties may differ as to the relief requested. Applicants argue in Part III of their motion that "In this instance, the questions of law and fact posed by the applicants *are identical* to the questions already framed in the original pleadings". See Applicants' Motion 17 (emphasis added). It certainly seems inconsistent for applicants to allege that appellants are not adequately representing their position in light of these circumstances.

only way the case could have been heard on appeal would have been by permitting intervention at the appellate level. On this basis, the court in *Smuck* found a lack of adequate representation and allowed intervention. In the present case, of course, the defendant has not failed to appeal.

In *Nuesse v. Comp.* (D.C. Cir. 1967), 385 F.2d 694, the Wisconsin Commissioner of Banks was granted intervention to protect the public interest between a private state bank and the United States. The court found that adequacy of representation was lacking because the issues involved the competitive position of all state banks while the original plaintiff was only concerned with its own competitive position. If anything, *Nuesse* supports appellees' position in this case that the State is the only representative capable of defending the interests of all employers as opposed to those of individual employers.

In *Ford Motor Co. v. Bizanz Bros. Inc.* (8th Cir., 1957), 249 F.2d 22, Ford attempted to intervene in an action brought to enjoin the operation of a railroad. Ford alleged the injunction would have deprived it of necessary transportation facilities. The railroad was not charged with representing Ford's interest in retaining essential railroad services. In the case at bar, however, the State has the duty to represent the employers' interest in the unemployment insurance fund.

In attempting to differentiate their interest from the State's, applicants contend that their interest is in preserving their right to due process before benefits are paid while the States' interest is an administrative concern. This is a distinction in semantics. Appellants have an interest and a duty to insure fairness to all parties—employers and employees alike. There simply is no reason to assume that applicants' interest is not being adequately represented in the case at bar.

D. Applicants' Motion to Intervene Is Untimely.

Intervention at the appellate level is very infrequently granted. See 3B *Moore's Federal Practice,* paragraph 24.13 [1] (1969) at 24-526. In *United States v. Blue Chip Stamp Co.,* (C.D. Cal. 1967), 272 F.Supp. 432, *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States* (1968) 389 U.S. 580, rehearing denied 390 U.S. 975, the court declared:

> "A motion to intervene after entry of a final decree should be denied as untimely in other than the most unusual circumstances." 272 F.Supp. 432 at 436.

An examination of the authorities cited by applicants shows that the unusual circumstances present therein are far different from the present case. In *Automobile Workers v. Scofield* (1965), 382 U.S. 205, petitioners for intervention were successful parties to a proceeding before the NLRB. Pursuant to a unique section of the Labor Act, only parties *adversely* affected by a decision of the NLRB could appeal. The result was that, although the successful party was actually a party to the proceedings below, it could not be heard on appeal. If the decision of the NLRB were reversed by the Court and remanded to the Board, and the NLRB subsequently entered a decision adverse to the former successful party, such party then became the party adversely affected by the decree and could then re-appeal. The Supreme Court allowed intervention to the appellate court to avoid a multiplicity of actions. In the case at bar, the applicants, failing to seek intervention in the action in the court below, were never parties to that action. If they had intervened at the proper time, it would not be necessary for them to seek intervention at the appellate level.

The two other cases relied on by applicants involved situations in which the original parties failed to appeal a judgment adverse not only to their interests, but also to the interests of the petitioners for intervention, thereby depriving petitioners of any representation of their interests at the appellate level. *Smuck v. Hobson* (D.C. Cir. 1969), 408 F.2d 175; *Wolpe v. Poretsky* (D.C. Cir. 1944), 144 F.2d 505, *cert. denied* (1944), 323 U.S. 777. In any event, none of the cases cited by applicants involved a case where intervention to the Supreme Court was granted.

Moreover, it is grossly unjust to allow applicants to claim that they did not have an opportunity to intervene in the court below. In a recent case it was shown that petitioners for intervention had been intimately involved in a suit from its inception but failed to intervene until one month after summary judgment was granted. The appellate court denied the motion because it was untimely. *Westward Coach Mfg. Co. v. Ford Motor Co.*, (7th Cir. 1968), 338 F.2d 627, cert. denied 392 U.S. 927. In the present case, applicants were aware of this litigation even before appellants filed their Answer and Motion to Dismiss. See Affidavit of Willard Z. Carr, Jr., dated October 23, 1970, 24, attached to Applicants' Motion as Exhibit H.

Counsel for applicants further attempts to justify their failure to intervene on the ground that he was not authorized to proceed until May 5, 1970 and was waiting in reliance on the possibility that the lower court would dismiss with leave to amend for failure to join indispensable parties. *Ibid.* While applicants might have an excuse for their procrastination if their counsel had not acted promptly despite authorization, they can hardly use their own neglect in authorizing counsel to represent them as an excuse for failing to make a timely motion. The issue is not whether

their counsel took timely action but whether his clients did. Moreover, such excuses fail to explain why applicants waited until October 30, 1970, to file their motion. As stated by their counsel, "although the necessary legal documents for the motion had been prepared, the factual information gathered with respect to the three original employers was not received until after the District Court entered its preliminary injunction on May 14, 1970". *Id.* at 26. The date of the latest affidavit by the applicants giving such factual information is August 26, 1970. See Affidavit of William L. Parker, dated August 26, 1970, attached to Applicants' Motion. No reason is given why applicants waited over two months before filing this Motion.

If the applicants had no one to represent their interest, or if those purporting to represent such interests had not provided sufficiently effective advocacy to assure the court below of a full and competent exposition of the question, the lateness of the Motion would be more excusable. However, the present circumstances fall far short of the unusual conditions necessary to grant intervention of right at the appellate level, and it would be an ominous precedent to allow volunteer champions to wait until a question has reached the Supreme Court before proclaiming their challenge. Applicants have been given consent by both parties to submit briefs as amici curiae. This will allow them to have their claims heard without undue interference with the course of the litigation.

III.

PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b) SHOULD NOT BE GRANTED AT THIS STAGE OF THE LITIGATION

Applicants have failed to raise any issues different from those raised by appellants. Moreover, applicants have had

ample time to seek intervention while this action was before the court below. Even assuming, *arguendo,* that applicants may have claims or defenses involving questions of law or fact in common with this action, a mere general interest in the outcome of the litigation is still not sufficient to warrant permissive intervention. 3B *Moore's Federal Practice,* para. 24.10[2] (1969); *cf. United States v. Aluminum Co. of America* (E.D. Mo. 1967), 41 F. R. D. 342, *aff'd per curiam sub nom. Lupton Mfg. Co. v. United States* (1967), 388 U.S. 457; *United States v. Chicago Title and Trust Co.* (N. D. Ill. 1966), 242 F.Supp. 56.

Permissive intervention in District Court is subject to the exercise of the court's discretion and, in exercising that discretion, the court must take into consideration the delay and prejudice to the adjudication of the rights of the parties that may result. Fed. Rules Civ. Proc. Rule 24(b), 28 USCA. Thus, the requirement of timeliness becomes much more significant in connection with permissive intervention because of its discretionary nature. Where the applicants have nothing new to add and are adequately represented in the trial court, and intervention would result in additional delay, the denial of permissive intervention is proper. See *Allen Calculators, Inc. v. National Cash Register Co.* (1944) 322 U.S. 137. This is especially true where applicants are attempting to intervene as parties appellant. See *McKenna v. Pan Am Petroleum Corp.* (5th Cir. 1962), 303 F.2d 778.

If there were no way in which applicants could submit their viewpoint to the Court, it might be different. But applicants have been given consent by the parties to appear as amici curiae and are thus assured that their contribution to the testing of this issue will not be ignored. The adequacy of this alternative was approved by the court in *Crosby*

Steam Gage and Valve Co. v. Manning, Maxwell and M... Inc. (D. Mass. 1943), 51 F.Supp. 972. There, the ... stated:

> "Where he presents no new questions, a third p... can contribute usually most effectively and al... most expeditiously by a brief amicus curiae and ... by intervention." 51 F.Supp. at 973.

If this is true at the trial court level, it is of even gre... persuasiveness here. If applicants were allowed to in... vene at this time, they would only be capitalizing on t... own tardiness in seeking intervention into this case. The... fore, this motion for permissive intervention should ... denied.

IV.

CONCLUSION

For the above reasons, applicants' Motion to Interve... should be denied.

Respectfully submitted,

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(Exhibits Follow)

Exhibit A

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.
Defendants,

AFFIDAVIT

I, J. E. McNEIL, the undersigned, having been duly sworn, do depose and state that:

1. I am Chief of the Accounting Section of the Department of Human Resources Development of the State of California, and I have custody of the records relating to employers' unemployment insurance tax accounts.

2. I further certify that the best estimate of the difference in taxes payable by employers, in a year like 1968, based on the high and low wage bases and tax rates is as shown in the table below:

a. Taxes payable on
   (1) $4,100 wage base..... $596.7 Million
   (2) $3,800 wage base..... $568.7 Million
   Difference ..... $ 28.0 Million

b. Balancing account taxes payable (using $3,800 taxable wage base) at
   (1) 1.0% general rate..... $191.0 Million
   (2) 0.8% general rate..... $153.0 Million
   Difference ..... $ 38.0 Million

c. Taxes payable (using $3,800 taxable wage base) on

(1) High rate schedule.....	$377.6 Million	
(2) Low rate schedule.....	$289.6 Million	
Difference		$ 88.0 Million
Total Difference		$154.0 Million

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. E. McNeil
J. E. McNeil

State of California
County of Sacramento } ss.

J. E. McNeil being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 19th day of November, 1969.

/s/ Sydney R. Johnson
Notary Public in and for the
State of California

[Seal]

Exhibit B

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.
Defendants,

AFFIDAVIT

I George Roche, the undersigned, having been duly sworn, do depose and state that:

1. I am the Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, and the amount of unemployment insurance benefits paid by said Department from the Unemployment Fund.

2. The statistical records of the Department of Human Resources Development indicate the following claims, referee appeals, and benefit activity for the calendar year 1968:

A. The total number of claims filed was 960,180.

B. 141,956 of these claims were determined invalid because the claimants had insufficient wages in their base periods.

C. 818,224 of these claims were filed by claimants who had sufficient wages in their base periods to file valid claims.

D. There were 667,993 issues of eligibility for or disqualification from unemployment insurance benefits which resulted in written determinations by the Department.

E. Of the 667,993 issues of eligibility, 401,917 were determined by the Department in favor of the claimant while 266,066 resulted in the claimant being disqualified from receiving unemployment insurance benefits for one or more weeks.

F. In 1968, 45,353 appeals were filed to referees of the California Unemployment Insurance Appeals Board.

G. Referees in 1968 issued 26,509 decisions of which 5,526 were decisions on appeals by employers and 20,983 were decisions on appeals by claimants.

H. Of the 5,526 decisions on appeals by employers, the decision reversed the determination of the Department and held in favor of the employer in 2,602 cases or 47 percent of these decisions. The decision affirmed the determination of the Department and held in favor of the claimant in 2,924 cases or 53 percent of these decisions.

I. A total of $404.3 million was paid in unemployment insurance benefits.

3. If benefits had been paid to the claimants involved in the 2,602 cases in which the employer prevailed before the referee in 1968, the cost of such benefits to the Unemployment Fund would have been approximately $800,000 based upon a weekly benefit amount of $50 and an average duration prior to the referee decision of slightly in excess of six weeks.

4. The statistical records of the Department of Human Resources Development concerning the claims and appeals activity set forth in paragraph 2 hereof for the calendar years 1965, 1966, and 1967, and additional appeals activity for the calendar year 1968 is set forth in the table attached hereto.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ GEORGE S. ROCHE
George Roche

State of California
County of Sacramento } ss.

George Roche being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 18th day of November, 1969.

/s/ SIDNEY R. JOHNSON
Notary Public in and for the
State of California

[Seal]